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Supreme Court, U.S.
FILED
NOV 14 200

No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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NOVEMBER 14, 2002

45 pp

QUESTION PRESENTED

Whether a federal criminal defendant, whose new appellate counsel fails to raise a claim of ineffective assistance of trial counsel on direct appeal, is procedurally barred from asserting that constitutional claim in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2255.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 3-10) and the opinion of the District Court for the Southern District of New York (Cedarbaum, J.) (Pet. App. 16-26) are unreported.

JURISDICTION

The unpublished summary order of the Second Circuit was issued on November 2, 2001, and a timely petition for rehearing was denied on January 14, 2002 (Pet. App. 1). The petition for a writ of certiorari was filed on April 15, 2002, and was granted on October 1, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2255, a habeas corpus statute, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF FACTS

The facts relevant to this appeal are, for the most part, undisputed and therefore can be introduced in summary fashion. In 1992, Joseph Massaro, the Petitioner, was charged in 10 counts of an 18-count indictment with racketeering and related RICO offenses. *United States v. Joseph Massaro*, No. 92 Cr. 529 (S.D.N.Y.)(MGC). At the core of the indictment was a charge of murder in aid of a racketeering enterprise. On October 27, 1993, a federal jury convicted Petitioner of the murder and all but one of the racketeering acts.

On July 26, 1994, Petitioner was sentenced to life imprisonment on the murder conviction and is presently serving his sentence at the federal penitentiary at Leavenworth, Kansas. This brief deals solely with Petitioner's conviction of a homicide that he has steadfastly denied committing.

A. The Fiorito Homicide

In the early morning hours of September 21, 1990, the body of Joseph Fiorito, an alleged Lucchese Family associate, was found shot to death in the backseat of his car near the Long Island Expressway in Queens, New York (Tr. 448-49).[1] That same day, one Patrick Esposito, while removing his blood-soaked clothing, confided to his girlfriend that he was involved in the murder of Joseph Fiorito (Tr. 435).

Esposito was arrested and charged in New York State Supreme Court with the murder (Tr. 444-45). In April of 1991, Esposito eventually plea-bargained his way out of the murder charge (J.A. 33). He agreed to testify that Petitioner, Joseph Massaro, fatally shot Joseph Fiorito. As a result of Esposito's cooperation agreement, the state charges against him for second-degree murder were dismissed (Tr. 451-52).

At Joseph Massaro's trial in federal court, Esposito claimed that he helped set the stage for the homicide in a vacant house on Butterfly Drive in Hauppauge, Long Island (Tr. 392-93). There, he alleged, Joseph Massaro was waiting in the basement and shot Fiorito in the head (Tr. 713). Afterwards, Esposito helped haul Fiorito from the house to Fiorito's car (Tr. 416-26), where his body was arranged in a sitting position in the backseat (Tr.

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[1] In this brief, the following abbreviations are used to indicate the source of quoted or referenced material: "J.A." refers to the Joint Appendix in this Court; "Pet. App." refers to the Appendix to the Petition for Certiorari; "Tr." refers to the trial transcript in the Southern District of New York in *United States v. Massaro*, No. 92 Cr. 529 (S.D.N.Y.) (MGC); "A.C.A." refers to the Appendix in the United States Court of Appeals for the Second Circuit for this § 2255 proceeding. *United States v. Massaro*, Docket No. 00-2720. "Gov't C.A. Br." refers to the Government's Brief in the Second Circuit in that proceeding.

718-19). Esposito also claimed that as they drove away, Petitioner expressed concern that Fiorito was not dead and shot him in the head a second time (Tr. 721-22).[2]

The car, with Fiorito's dead body, was abandoned on a street in Queens where a second man, Joseph Kern, picked up Esposito and Petitioner in another car (Tr. 433). Kern and another man, John Tripi, went to the house on Butterfly Drive afterwards and recovered the shell casing from the bullet fired in the basement (Tr. 443-44).

The police discovered Fiorito's body in the morning and, while removing the body, found a spent shell casing on the floor of the car (Tr. 903-04). However, after pulling up the floor mats and examining the scene for ballistics evidence, the police never found any bullet (Tr. 910-11, 939, 4466-67; J.A. 37).

Esposito had returned home on the night of the shooting and confessed to his girlfriend that "they just did Joey Fiorito" (Tr. 435). He did not name Joseph Massaro as one of the participants in the homicide (Tr. 435-36). Esposito's girlfriend ultimately notified the police about his involvement in the Fiorito homicide. Esposito's clothing, recovered from a dumpster, was heavily stained with Fiorito's blood (Tr. 435, 437).

Joseph Massaro was not arrested until June 24, 1992, almost two years after the homicide and after Esposito began cooperating with the authorities. No bloody clothing was ever recovered from Petitioner, and no guns or bullets were traced to him. The Fiorito murder weapon was never found (Gov't C.A. Br. 15 n.).

[2] This alleged second shot became *the* major point of contention during Petitioner's trial.

By this time, the police and FBI had again searched the car but found no bullets or bullet holes (Tr. 4160-79; J.A. 39). Ultimately, the car was released from the police impound and sold (J.A. 40). A "second or third owner" eventually purchased the car from a gas station in December of 1992 (Tr. 3654; J.A. 40).

In August of 1993, a month before Joseph Massaro's murder trial, the police tracked down the car (Tr. 4185). Then, on September 2, 1993, police officers thoroughly searched the car (Tr. 4184-92). They physically removed the backseat and pulled up the carpet and insulation (Tr. 4187-89). Once again, no bullet or bullet hole was found (Tr. 4191-92).

B. The Trial and the Prosecution's Belated Disclosure of the Bullet

There was absolutely no tangible or forensic evidence that, in any way, connected Petitioner to the murder. The word of Esposito was all that linked Joseph Massaro to the Fiorito homicide (Tr. 388-446). However, on September 6, 1993, the day before the trial was scheduled to start and just four days after trained police officers had again searched the car, the most recent owner of Fiorito's car claimed that he had found a bullet and bullet hole in the carpeting behind the driver's seat near the transmission hump (Tr. 3661-64). The Assistant United States Attorney in charge of the prosecution elected not to advise the court or defense counsel of this discovery (J.A. 53-55).[3]

[3] The prosecutor later admitted that he should have "turned that bullet over the moment it was discovered" (J.A. 129).

The next day, September 7, 1993, counsel for Joseph Massaro, in his opening statement to the jury, declared that "[t]here is not one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place or had anything to do with [the murder of Joseph Fiorito], except [the word of] Patty [Esposito], who is buying his freedom" (Tr. 42).

The Government stood silent during all of this and said nothing to either defense counsel or the court about finding a bullet (Tr. 42). After the opening statements the Government called several witnesses, including its key witness, Patrick Esposito, who testified for two days (September 8 and 9, 1993). Still, the Government revealed nothing about the newly discovered bullet (Tr. 90-474; J.A. 49).

On Saturday, September 11, 1993, the prosecutor faxed a letter to defense counsel advising him of the bullet and that a videotape had been made showing where in the car the bullet had been recovered (J.A. 53-55, 176). However, when the trial resumed on September 13, defense counsel failed to raise with the District Judge the issue of the last-minute discovery of the bullet and did not request a copy of the videotape (J.A. 56-57, 65-66).

Not until September 23, 1993, almost two weeks after having been notified of the bullet, did defense counsel voice his concern over the Government's failure to reveal the results of its ballistics analysis (Tr. 1936-37).

C. The Trial Judge Repeatedly Encouraged Defense Counsel to Adjourn the Proceedings to Investigate the Bullet Evidence

On September 27, 1993, 21 days after its discovery, the prosecutor claimed that the spent bullet matched the shell fragments recovered from Fiorito's head (Tr. 1944).[4] The next day, on September 28, defense counsel "reluctantly" moved for a mistrial — which was denied by the trial court (J.A. 15, 19-20, 24, 30).[5]

Nonetheless, the District Judge offered to adjourn the case so that counsel could examine the bullet and investigate the peculiar circumstances of its discovery (J.A. 20, 24). However, counsel refused the offer (J.A. 20).[6] At this time, defense counsel still had not viewed the videotape showing where the bullet had been recovered and had not inspected the car in which the bullet was allegedly found (J.A. 43-44, 60).[7] Counsel also failed to investigate the bullet's last-minute discovery on the eve of trial (J.A. 24-25).

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[4] The remains of the first bullet were apparently recovered in Joseph Fiorito's head as copper jacket fragments and lead core fragments, rather than an intact bullet (J.A. 148, 153).

[5] Counsel advised the court that "this is going to be a financial disaster for me if I have to try this case again" (J.A. 25). He further indicated that "[i]t will break me to do this. It is going to virtually bankrupt me if I have to try this case again" (J.A. 19).

[6] Counsel rejected a continuance but requested, at the very least, that the court preclude the bullet evidence (J.A. 25). That request was also denied (J.A. 109).

[7] On October 1, 1993, the Government gave a copy of the videotape to defense counsel, who had failed to request it (J.A. 65). Counsel indicated that he failed to view the Government's videotape because "I am in the middle of keeping five balls up in the air, Your Honor. I am coming in here at 8:30 in the morning. Maybe I missed it" (J.A. 66).

Judge Cedarbaum encouraged defense counsel on at least three occasions to accept a continuance of the proceedings so that he could conduct a proper investigation of this new and apparently inculpatory evidence (J.A. 20, 24, 56).[8] She also offered defense counsel an opportunity to recall Government witnesses so that he might adjust his defense strategy in light of these startling new developments (J.A. 107-08).

Despite these overtures, counsel declined to examine the circumstances that produced this bullet, found three years after the murder by the new owner of the car following several thorough police searches (Tr. 1926; J.A. 60-61).[9] Instead, counsel went forward with the trial, accepting the Government's representations that the bullet was connected to the murder (J.A. 24-25). He also agreed with the opinion of the Government's ballistics expert that the bullet matched fragments of the bullet taken from Fiorito's head (J.A. 25).[10]

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[8] The prosecutor conceded, "if there is a bullet in there it is very important to our case" (J.A. 41).

[9] Counsel admitted during discussions relating to the continuance, "I may have made a mistake. I made a mistake. Is Mr. Massaro to pay for my mistake when the government comes in and says they found a bullet?" (Tr. 2908). He also acknowledged that he could have asked for a continuance when he was cross-examining the medical examiner (Tr. 2915).

[10] It took the Government's experts two weeks to match the bullet to the fragments (J.A. 67). The NYPD ballistics laboratory could not match the bullet to the shell casing found in the car, and the prosecutor revealed that "the first indication was there was nothing I could do with it because there was no match" (J.A. 42, 50). In contrast, although defense counsel did undertake some independent investigation of the bullet, he indicated that "it took our expert all of about 15 seconds to do this on a microscopic examination" (J.A. 57).

The Government then exploited the newly found bullet, which was admitted into evidence, by arguing in summation:

> Now, the physical evidence is the stuff that cannot be accused of a failing memory, doesn't fade with time. It is not subject to claims of bias or allegations of slant, and it doesn't even have a cooperation agreement with the government. That is the stuff like the bullet fragments which were recovered from the head of Joe Fiorito, and like the bullet which was recovered from the back of the car, the second shot that Joseph Massaro fires from the same gun into Joe Fiorito's head for good measure (Tr. 5059).

The prosecutor also argued that the Government's expert said the bullet found in the car came from the same gun as the bullet fragments that were recovered from Fiorito's head and "the bullet matched from the same gun, from the gun that Joe Massaro used" (Tr. 5205).

Thus, the bullet became the single most important piece of evidence in Petitioner's trial. It severely undermined the defense efforts to discredit Esposito's testimony by showing that no shot was fired in the car (J.A. 21).

(continued from previous page)

Counsel did recall one crime scene investigator (Tr. 4461-80). That police witness testified that he spent an hour at the scene and examined the car with a flashlight. He even picked up the floor mats in the back to search for ballistics evidence, but did not find any bullets or bullet holes during his investigation (Tr. 4466-68).

Joseph Massaro was convicted and received *life sentences* on the three counts of the indictment that related to the Fiorito murder.[11] He has already been incarcerated for more than 10 years.[12]

D. The Direct Appeal

On his direct appeal, new counsel raised a number of issues including the claim that the District Court erred in admitting the bullet into evidence. He also argued the issue of the Government's delay in disclosing the bullet until well into the trial.

During the oral argument in the Second Circuit, Judges Altimari, Jacobs and Calabresi expressed outrage that such a critical piece of evidence was withheld from Petitioner's counsel under these circumstances (J.A. 118-42).[13] Judge Guido Calabresi even declared that the prosecutors were holding back the bullet "in their vest pocket" (J.A. 118).

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[11] Joseph Massaro was sentenced to a concurrent term of 5 years of imprisonment on Count Ten, for travel from New York to New Jersey in aid of extortionate racketeering charged in certain counts of the indictment. He was also sentenced to concurrent terms of imprisonment of 20 years on six other counts of economic extortion (A.C.A. 14).

[12] He has been in the Government's custody since his arraignment on July 2, 1992 (A.C.A. 3).

[13] One of the judges chastised the prosecutor who tried the *Massaro* case: "You don't consider the possibility that counsel who has in a major case planned a whole strategy and is — has begun their strategy is suddenly confronted with the possibility of new evidence of this sort and instead of making a cool and collected tactical judgment, simply *makes a mistake* at that point not to ask for a continuance because after all it's in the middle of a trial and there's a certain [amount] of pressure both ways and then as a result of that *what you now concede is the most important evidence in the trial comes in.* And that this was a tactic that it was just somebody that got put in a tough situation because of your mistake" (J.A. 137) (emphasis supplied).

Nonetheless, the Second Circuit affirmed the conviction and found that such Government conduct "did not irreparably damage Massaro's strategy . . . Massaro has not claimed that he would have changed his cross-examination [of Esposito] had he been aware of the bullet" (Pet. App. 36).[14]

On October 16, 1995, this Court denied certiorari on Petitioner's direct appeal from his conviction. *Massaro v. United States*, No. 95-461, 516 U.S. 933 (1995). The issue of ineffectiveness of counsel in failing to investigate the sudden appearance of the bullet was not presented to this Court in that petition.[15]

E. Trial Counsel's Ineffectiveness Is Raised in a Motion Pursuant to 28 U.S.C. § 2255

In anticipation of a possible motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure,[16] new counsel, Michael Tigar, was engaged to investigate the evidence and proceedings leading to Joseph Massaro's conviction (J.A. 180). The forensic investigation revealed that the shooting in the car *could not have occurred* in the manner

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[14] The Second Circuit's decision did, however, declare that "the government should have advised the defense immediately of the bullet's discovery" (Pet. App. 36).

[15] The two issues presented were (1) whether there was sufficient effect on interstate commerce to warrant this criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951, and (2) whether the Government's failure to disclose the discovery of a crucial piece of evidence, to wit, a matching bullet, until after opening statements and cross-examination of a witness violated the Defendant's rights under the Due Process Clause.

[16] Fed. R. Crim. P. 33 provides that a defendant may make a motion for a new trial based on newly discovered evidence.

described by Esposito and that it was *highly unlikely* that the bullet was connected with the Fiorito homicide (J.A. 151, 161-62).

For example, Robert Kopec, a well-recognized forensic expert who reviewed "numerous police reports, laboratory reports, autopsy reports, statements, photographs, diagrams and transcripts of the trial testimony" in Joseph Massaro's case, concluded that "it is unlikely that the shooting occurred in the vehicle" (J.A. 145). The expert based this determination in part on the fact that the "copper-jacketed hollow point bullet" was found in "only a moderately deformed condition" even though such a bullet that allegedly passed through "both sides of the victim's skull, his brain, and striking the carpeted metal floor of the vehicle" would have been "expected to be found in an extremely deformed condition" (J.A. 148-49). Color photographs, which are reproduced at J.A. 153-54, support the expert's opinion.

In addition, Charles Morton, a leading criminologist, inspected the physical evidence on October 23 and 24, 1996. Although the Government permitted only a restricted examination, his investigation revealed "serious questions about the validity of this evidence" (J.A. 174). Mr. Morton's affidavit (J.A. 164-75) was significant, not just in discrediting the prosecution, but also in pointing out defense counsel's failures at trial. Mr. Morton observed that "[n]o attempt was made to adequately document the condition of the hole in the carpet or to test it to determine if, in fact, it was a bullet hole consistent with the .380 auto cartridge case and bullet found in this case" (J.A. 174). This is crucial in light of concessions that counsel never examined the car in which the bullet was found (Gov't C.A. Br. 29). Furthermore, Mr. Morton alerted new counsel that "[n]o attempt was made to test

blood or tissue residues on the bullet, as shown in photographs, to determine if it was consistent with being from the victim" (J.A. 174-75).

It was only then that the full impact of and prejudice from trial counsel's failure to seek a continuance became evident. But Petitioner's direct appeal had been exhausted before these crucial findings were made. Thus, Joseph Massaro was forced to bring his ineffectiveness claim in the instant proceeding pursuant to 28 U.S.C. § 2255 (A.C.A. 18).

F. The District Court and Second Circuit Find That the Ineffectiveness Claim Is Procedurally Barred Because It Was Not Raised on Direct Appeal

The District Judge held that Petitioner was "procedurally barred" from raising the ineffectiveness claim in a § 2255 proceeding because he "was represented by new counsel on appeal and each of the grounds he asserts to support this claim was apparent from the trial record" (Pet. App. 24-25). The District Court never addressed the merits of Joseph Massaro's ineffectiveness claim (Pet. App. 26).

On December 26, 2000, the District Court granted a Certificate of Appealability on the issue of

> whether trial counsel's decision not to accept a continuance after receiving important new information from the government, which Massaro now characterizes as a deprivation of his right to effective assistance of counsel, is procedurally barred by the failure of new appellate counsel, who raised the issue of the government's belated disclosure, to also argue that issue under the rubric of ineffective assistance of counsel (Pet. App. 27).

In addition, the Second Circuit concluded that Petitioner was procedurally barred from obtaining any review of his ineffectiveness claim because he was "represented by different counsel during direct appeal of his conviction" and "the basis for Massaro's claim of ineffective assistance of counsel for failure to accept a continuance is based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal" (Pet. App. 7).[17] The court further held that Petitioner did not establish cause for the failure to raise the ineffectiveness issue on direct appeal because there was no showing that the factual basis for the claim was not reasonably available, despite the exercise of reasonable diligence (Pet. App. 8). The Second Circuit never touched upon the merits of Petitioner's ineffectiveness claim.

On January 14, 2002, the Court of Appeals for the Second Circuit denied Joseph Massaro's petition for rehearing and suggestion of rehearing *en banc* (Pet. App. 1). On October 1, 2002, this Court granted a petition for certiorari.

[17] The court reasoned that "[a]t trial, Massaro's counsel engaged in many discussions about the decision not to accept a continuance" (Pet. App. 7).

SUMMARY OF ARGUMENT

Virtually all the Courts of Appeals hold that defendants who have been deprived of their constitutionally guaranteed right to the effective assistance of counsel can assert that complaint in a collateral proceeding, authorized by 28 U.S.C. § 2255, even if they failed to raise the issue on direct appeal. The Solicitor General has historically supported this view.

However, the Court of Appeals for the Second Circuit has barred Petitioner from bringing his ineffectiveness claim in a collateral proceeding because the court concluded that the issue was based solely on the trial record and new appellate counsel failed to raise the claim on direct appeal. The court, citing to *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), also found that Petitioner did not show sufficient "cause" why the issue was not raised on direct appeal.

This Court should, under its supervisory powers, adopt a uniform policy that permits a § 2255 petitioner to raise a Sixth Amendment ineffectiveness challenge even though that issue was not raised on direct appeal.[18] The Solicitor General has recognized that a defendant should be allowed "to raise a claim of ineffective assistance of counsel on collateral review without being required to show why the claim could not have been raised on direct appeal" because it "avoids time-consuming litigation over issues of cause and prejudice" (Solicitor General Br. in Opp'n to Cert. at 12). This procedure also "ensures that the district court

[18] This Court "has supervisory authority over the federal courts" and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. § 2255 before their presentation to an appellate court." *Id.*

Moreover, the rationale for differentiating an ineffectiveness claim from normal appellate rules of procedural forfeiture derives from a recognition that such claims customarily depend on facts that are outside the trial record. Thus, a § 2255 proceeding is better suited than an appellate court to accumulate the facts relevant to such a challenge. And, it permits a District Judge to pass on *all* the defendant's ineffectiveness claims, at one time, *before* appellate review is undertaken.

This procedure is consistent with conventional notions of appellate review, where only those matters previously decided by a District Judge, and accompanied by factual findings, are subject to review. Thus, the collateral review rule is more efficient than the rule of the Second Circuit. Also, the collateral review procedure provides a bright-line rule that has the advantage of certitude and is much more easily administered.

In contrast, the Second Circuit's rule fails to provide any clear-cut standards by which a defendant can gauge whether a potential ineffectiveness claim should be raised on direct appeal. Terms such as "solely on the record developed at trial," the "*cause*" factor justifying a failure to raise the issue on direct appeal, and the consequential "actual *prejudice*" resulting from such a default are fraught with ambiguity and uncertainty. These vague variables that must be applied to ineffectiveness claims in the Second Circuit have been an endless source of controversy and

litigation.[19] For instance, questions concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record can be immensely complicated and confusing. And, even if the facts giving rise to counsel's ineffectiveness are spelled out on the record, the *prejudice* to the defendant required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent.

But, perhaps the most serious flaw in the Second Circuit's reasoning is its admonishment that lawyers should strive to raise all ineffectiveness claims on direct appeal even if further factual development may be required. This is extremely troublesome and presents some serious hazards. In essence, an appellate lawyer is required to search the record for all ineffective assistance claims to avoid possible waiver of those issues. In turn, the appellate court is obligated to sort through the choate and inchoate ineffectiveness claims, which is a timely and cumbersome task.

Thus, a rule that allows for collateral review is clearly the most orderly and efficient method of resolving the ever-growing number of ineffective assistance claims. That is why it has attracted such overwhelming support from most of the Circuit Courts and was promoted by the Solicitor

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[19] The law on this issue in the Second Circuit is actually terribly confusing to appellate attorneys. For example, in *Riascos-Prado v. United States*, 66 F.3d 30 (2d Cir. 1995), the Second Circuit was forced to address the applicability of the *Billy-Eko* doctrine where various claims of trial counsel's ineffectiveness arose — some of which were fully developed on the record while other claims were not. The court concluded that new appellate counsel would be required to raise, on direct appeal, "those claims of ineffectiveness that needed no elaboration of the trial record" while reserving the other ineffectiveness claims for resolution in a collateral proceeding after further factual development. 66 F.3d at 35.

General. In contrast, judged from the infallible distance of time, the Second Circuit's procedure has proven to be inefficient and inequitable. It should be replaced by the prevailing practice of allowing all ineffectiveness claims to be brought in a § 2255 proceeding.

In this case, Petitioner's counsel, when surprised with a bullet during his murder trial, declined to accept the court's offers of an adjournment to enable him to investigate the bullet's connection to the homicide, as well as the peculiar circumstances of its last-minute discovery. This dereliction was particularly devastating when the bullet became the single most damaging piece of evidence leading to Petitioner's conviction. A subsequent investigation produced evidence indicating that it was "highly unlikely" that the bullet was connected to the shooting.

The critical failure to take time to properly investigate the bullet infiltrated every tissue of the case because of the central role the bullet played at trial. This piece of evidence became the lynchpin of the whole prosecution. And, sadly, it gave the Government's case a false authenticity that simply could not be overcome by defense counsel without the knowledge of the *true* evidence that now drastically undermines any connection of the bullet to the murder. The failure to seek a continuance was decisive because it would have enabled counsel to demonstrate facts, available at the time, which would have put the lie to the so-called "telltale" bullet.

Prisoners such as Joseph Massaro, who have been convicted because of constitutional errors, suffer a grievous wrong. The Second Circuit's decision denying him a hearing on his ineffectiveness claim has deprived Petitioner of his Fifth Amendment right to due process and equal

protection of the law. He should, at the very least, be entitled to a hearing into the substance of his complaint without being required to show why the claim could not have been raised on direct appeal.

The procedural bar fashioned by the Second Circuit, which has been rejected by most of the Courts of Appeals, unjustly deprives defendants of judicial review of their Sixth Amendment claims, erodes confidence in the criminal justice system and degrades the constitutional right to the effective assistance of counsel.

ARGUMENT

The right to the assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, forms the very heart and soul of our federal criminal justice system because it protects "the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984), *citing Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). However, the representation must be *effective* to fulfill the constitutional necessities of the Sixth Amendment. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Effective lawyers are "essential because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). The defense of criminal cases, where a person's life and liberty are at stake, requires an all-consuming commitment to the client.

Joseph Massaro was denied this quality of commitment when his trial attorney failed to investigate the singular piece of evidence that condemned him to a sentence of life imprisonment. And now he has been precluded from asserting that complaint, grounded in the Sixth Amendment, because of an unusual rule of procedural forfeiture devised by the Court of Appeals for the Second Circuit.

The profound equal protection and due process implications of this important issue are underscored by the realization that similarly situated defendants in other parts of the country are permitted to assert such a claim in a collateral proceeding.

I. Federal Criminal Defendants Should Not Be Procedurally Barred from Challenging Trial Counsel's Effectiveness in a Collateral Proceeding

This Court has held that "[b]ecause collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." *Kimmelman*, 477 U.S. at 378.

Nearly every Circuit Court has adopted the rule that ineffectiveness claims should be brought in a collateral proceeding pursuant to 28 U.S.C. § 2255, rather than on direct appeal.[20] The formidable reasons in favor of presenting ineffectiveness claims in collateral proceedings rather than on direct appeal were cataloged by the Eleventh Circuit in *United States v. Griffin*, 699 F.2d 1102 (11th Cir. 1983).

First, in a § 2255 proceeding the defendant is afforded a full opportunity to produce facts that establish ineffectiveness of counsel and the Government has the

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[20] *See, e.g.*, *United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998), *cert. denied*, 526 U.S. 1059 (1999); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3rd Cir. 2002); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997); *United States v. Rivas*, 157 F.3d 364, 369 (5th Cir. 1998); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, No. 00-10790, 122 S. Ct. 181 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *cert. denied*, No. 01-9266, 122 S. Ct. 1638 (2002); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989), *cert. denied*, 498 U.S. 819 (1990); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*); *United States v. Griffin*, 699 F.2d 1102, 1107-09 (11th Cir. 1983); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 895 (1999).

chance to present evidence as well. The District Court hears the actual testimony and makes judgments concerning credibility. The end result is a full factual record that bears precisely on the issue. *Griffin*, 699 F.2d at 1109.[21]

Second, an "election to decide whether the record on appeal is adequate for decision on the issue not only adds to the burgeoning workload of appellate judges in a particular case, but makes a mockery of the repeated statement that the issue [of ineffectiveness] may not be presented for the first time on appeal." *Griffin*, 699 F.2d at 1109. Defendants will feel compelled to raise ineffectiveness claims that are, at best, questionable or unripe, and counsel for the Government and the Court of Appeals will be obligated to scour the record to determine whether or not the matter was, in fact, fully developed.

Finally, where "a perfectly adequate, indeed superior, judicial procedure agreeable to the Constitution has been established for presentation and determination of an issue [28 U.S.C. § 2255]," the courts' "duty to all of the interests involved lies not in devising or permitting a fugitive procedure of [its] own design but in requiring adherence to the procedure established." *Griffin*, 699 F.2d at 1109.

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[21] Although not addressed by *Griffin*, since the enactment of the Antiterrorism and Effective Death Penalty Act in 1996, all appeals in proceedings brought under 28 U.S.C. § 2255 require a "Certificate of Appealability" from the District Judge or Court of Appeals. 28 U.S.C. § 2253(c)(1). A "Certificate of Appealability" may not be issued unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this system, many ineffectiveness claims are resolved in the District Court without any need for appellate review.

In *United States v. Cronic*, 466 U.S. at 667 n.42, the Solicitor General embraced the approach that "a defendant can attack the actual performance of trial counsel only through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal." The Government's principal reason for advocating this rule is that such claims inevitably require consideration of facts that "are outside the record on direct appeal and that should be considered by the district court in the first instance."[22]

The prevailing rule, which, as discussed below, is deeply rooted in the doctrines of judicial economy and due process, provides that even if the claim could fairly be resolved on direct appeal, *no procedural bar* will apply to ineffectiveness claims that were first brought in post-conviction proceedings instead. *See, e.g., United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*) (claims that are fully developed in the record *may* be brought on direct appeal *or* under § 2255); *United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).

In fact, the Solicitor General repeatedly endorsed this approach in briefs filed in this Court. And, based on that formidable stance, this Court granted certiorari to vacate judgments where defendants were erroneously barred from presenting ineffectiveness claims on direct appeal. *See, e.g., Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990). In each of those cases, this Court remanded the claims to the Circuit "for further consideration in light of the position asserted by the Solicitor in his brief for the United States."

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[22] Solicitor General Br. in Supp. of Cert. at 6, *Billy-Eko v. United States*, 509 U.S. 901 (1993) (No. 92-7897).

II. The Second Circuit's Procedure

Following this Court's remand of *Diaz-Albertini* to the Tenth Circuit, the full complement of that Court of Appeals eventually adopted the Solicitor General's approach. *See United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (*en banc*). However, after this Court's remand of *Billy-Eko*, the Second Circuit persisted in adhering to its original position that a defendant is barred from bringing an ineffectiveness claim in a § 2255 proceeding where the issue appears on the record and where new appellate counsel fails to raise that issue on direct appeal. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993).[23] Under the Second Circuit's approach, the only way a defendant can gain relief from this strict rule of preclusion is to establish just cause for his lawyer's default *and* demonstrate "actual prejudice" resulting from that omission. *Billy-Eko*, 8 F.3d at 115. This is too high a barrier to overcome.[24]

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[23] In *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993), the Seventh Circuit seemed to adopt a procedure similar to that of the Second Circuit — finding a waiver of any ineffectiveness claim that could have been asserted by new counsel on direct appeal. However, in an incisive and thoughtful concurrence, Circuit Judge Frank H. Easterbrook denounced the majority's decision that directed district judges "to enforce a forfeiture rule that neither prosecutors nor prisoners want." 6 F.3d at 475-76 (Easterbrook, J., concurring).

[24] Petitioner is only one in a long line of criminal defendants who have become casualties of *Billy-Eko*. Time and time again judges in the Second Circuit have invoked its rule to bar federal defendants from ever obtaining any judicial review of their trial counsel's failings. *See, e.g., Douglas v. United States*, 13 F.3d 43 (2d Cir. 1993); *Hernandez v. United States*, No. 97 Civ. 5620 (TPG), 2002 WL 2012624 (S.D.N.Y. Aug. 30, 2002); *Mendez v. United States*, No. 99 Civ. 3496 (JFK), 2002 WL 1402321 (S.D.N.Y. June 28, 2002); *James v. United States*, No. 00 Civ. 8818 (GWG), 2002 WL 1023146 (S.D.N.Y. May 20, 2002). This list is illustrative only and is by no means exhaustive.

The *Billy-Eko* rule of preclusion is flawed in its most fundamental aspects. Questions abound concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record. For example: (1) Was a full evidentiary hearing conducted as to the specific issue or, as in Petitioner's case, was it merely mentioned during the course of the trial? (2) Must a full adversarial hearing be conducted on a failing that may have its roots in the trial record — such as counsel's failure to object to the admission of certain evidence? (3) Must the defendant be represented by separate counsel during any proceeding in which a challenge to the effectiveness of his attorney has been presented? (4) Should defense attorneys be given an opportunity to explain their actions?[25]

Additionally, under *Billy-Eko* the appellate court is frequently obliged to confront claims based on incomplete records that need to be reinforced with facts from the attorney accused of the deficient performance. Thus, the Court of Appeals is often compelled to remand the case for a full hearing in the District Court or direct that the ineffectiveness claim be reinstated in a § 2255 proceeding.[26] And, even if the facts giving rise to counsel's ineffectiveness are fully spelled out on the trial record,

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[25] As recognized by the Tenth Circuit, "at the very least counsel accused of deficient performance can explain their reasoning and actions, and the district court can render its opinion on the *merits* of the claim." *Galloway*, 56 F.3d at 1240 (emphasis supplied).

[26] "[F]orcing criminal defendants to raise ineffective assistance claims on direct appeal is an impractical approach which fails miserably at furthering the goal of finality of judgments" because, in part, the procedural bar doctrine is "painfully labor intensive to sort through and apply." *English v. Cody*, 146 F.3d 1257, 1262 (1998).

the *prejudice* to the defendant through counsel's deficient performance, required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent on direct appeal.[27]

In addition, under the Second Circuit's approach, appellate counsel, who is bound by the trial record, must now undertake investigations to find prejudice. This requires exploration outside the boundaries of the trial. Such a requirement places unreasonable and unbearable burdens upon appellate counsel, who may himself face exposure to a separate ineffectiveness claim if he does not conduct such an investigation.

Another unsettling aspect of the Second Circuit's rule is its stern warning that appellate lawyers would be "well-advised to err on the side of inclusion [of an ineffectiveness claim] on direct appeal" even if further factual development is required. *Billy-Eko*, 8 F.3d at 116. The panel explains that this will give the Court of Appeals an opportunity to either remand the case to the District Court or leave the defendant to his post-conviction remedies. *Id.* However, this cumbersome parsing and paring of ineffectiveness claims is completely avoided by the rule that allows for collateral review, rather than a procedural bar. Significantly, one of the main virtues of the collateral review rule is that all ineffectiveness claims can be brought in a single proceeding in the District Court, which has the facilities for developing a full record.

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[27] In *Strickland*, this Court established a two-prong test with which to evaluate ineffective assistance claims: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687.

But, more important, appellate counsel's obligation to present any possible ineffectiveness claim on direct appeal is fraught with hazards for the defendant. If counsel raises an unripe or sheer ineffectiveness claim merely to avoid the risk of waiver, the Court of Appeals may actually reject the claim on the merits, finding that the incomplete record was sufficient for adjudication. That defendant would then be barred from raising the same issue in a collateral proceeding because the court reached the merits of the ineffectiveness claim, even though further factual development — outside of what appeared on the record — may have established that counsel was truly ineffective.

Therefore, in the long run, defendants may be prejudiced by appellate attorneys who raise premature ineffectiveness claims that would have been stronger if reinforced with additional facts available in a § 2255 proceeding. As Judge Easterbrook of the Seventh Circuit so incisively observed, lawyers "who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

The collateral review rule, used by most of the Circuit Courts and advocated by the Solicitor General, allows appellate counsel to attend to the more urgent appellate objectives and leave any potential ineffectiveness claims for a § 2255 proceeding. This way counsel can concentrate on the true appellate issues that stem from the trial record rather than search for ineffectiveness claims that are only partially visible in the trial record.

III. The Cause and Actual Prejudice Exception Should Not Be Applied to Ineffective Assistance Claims

Recognizing the severe consequences of waiver, the Second Circuit conceded an "eye of the needle" exception to the *Billy-Eko* doctrine of procedural forfeiture whereby the failure of new appellate counsel to raise a fully developed ineffectiveness claim on direct appeal can be excused only "if the defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulted therefrom" (Pet. App. 7). However, the "cause and actual prejudice" exception is notoriously unwieldy and unworkable, as acknowledged by the Tenth Circuit:

> [I]f procedural bar is raised as a defense, it embroils us in nonmerits issues which are as time consuming as if we went straight to the merits, and infinitely less productive. Applying, as we must, the cause and prejudice standard for avoiding the procedural default, we must first examine all the reasons advanced as cause, and write on the subtext after revisiting everything that happened on direct appeal, and then some. In conjunction, or as an alternative, we must examine prejudice, which is nothing less than evaluating the merits to determine whether we should evaluate the merits. Nothing productive is accomplished. *Galloway*, 56 F.3d at 1242.

The Third Circuit also concluded that the perplexing "cause and actual prejudice" standard does not apply to an ineffective assistance of counsel claim asserted in a § 2255 petition. *United States v. DeRewal*, 10 F.3d at 101 (the requirement would lead to unnecessary confusion and a proliferation of litigation regarding alleged procedural defaults).

We recognize that this Court has adopted the "cause and actual prejudice" standard where a defendant seeks to obtain collateral relief based on trial errors to which no contemporaneous objection was made. *United States v. Frady*, 456 U.S. 152, 167-68 (1982). However, for the sound reasons suggested by the Courts of Appeals for the Third and Tenth Circuits, as well as the Solicitor General, this difficult standard should not be used to bar defendants from raising Sixth Amendment claims.

IV. The Deprivation of a Defendant's Right to Judicial Review of a Constitutional Question Requires Uniform Resolution

A defendant's right to the effective assistance of counsel continues to be an issue of great concern in all federal courts. Thus, it is evident that this Court should give some definitive guidance concerning when these claims may be brought and in what manner. Despite acknowledging a clear conflict among the Circuits as to this issue, the Solicitor General opposed certiorari by this Court on the basis that the "choice of which procedural rule to adopt is not an issue requiring a uniform national solution" (Solicitor General Br. in Opp'n to Cert. at 11-12).

However, the right to obtain judicial review of an ineffectiveness claim, brought under the Sixth Amendment, is a matter that needs a national policy for its resolution.[28] Moreover, the Solicitor General previously acknowledged that "[t]here is, of course, much to be said for a clear and uniform rule in this area, so that appellate counsel, the government, and the courts will not have to speculate about whether an ineffective assistance claim is properly

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[28] Benjamin N. Cardozo, *The Nature of the Judicial Process* 112 (Yale Univ. Press 1921) ("One of the most fundamental social interests is that law shall be uniform and impartial").

presented on direct appeal and will not have to draw uncertain lines in proceedings under 28 U.S.C. 2255 in deciding whether the claim should have been presented on direct appeal" (Solicitor General Br. in Opp'n to Cert., *Diaz-Albertini v. United States*, No. 90-552 (Dec. 1990)).

The Solicitor General continued that the "general rule we proposed in *Cronic* and *Chappell*[29] — that claims of ineffective assistance of trial counsel should be raised for the first time in the District Court in a motion under Section 2255 — serves that purpose." *Id.* The Solicitor General concluded that "although a defendant in petitioner's position might be fully able as a practical matter to raise his ineffective assistance of trial counsel claim on direct appeal, the preferable result from the perspective of the federal criminal justice system as a whole is that he should not be required to do so — and that he therefore need not show cause for failing to do so in order to raise the claim in a motion under Section 2255." *Id.*

The creation of a bar to, or a forfeiture of, the presentation of constitutional claims in § 2255 proceedings constitutes a radical departure from the "accepted and usual course of judicial proceedings" whereby § 2255 motions are *the* proper and conventional way to challenge counsel's ineffectiveness.[30] Thus, this case fully qualifies for the

[29] *Chappell v. United States*, 494 U.S. 1075 (1990).

[30] Supreme Court Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a) further provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's supervisory power."

exercise of this Court's supervisory power to impose some consistency and uniformity in this important area of controversy. *Cf. Dickerson v. United States*, 530 U.S. 428, 437 (2000).

The Solicitor General suggests that this Court should refrain from establishing one standardized rule for all federal defendants because the issue is procedural rather than substantive (Solicitor General Br. in Opp'n to Cert. at 12). However, this Court has historically granted review, even in the civil context which involves considerably lesser constitutional interests, to resolve questions relating to the Court of Appeals' jurisdiction.[31]

Moreover, a division among the Circuits invites confusion — especially in the criminal context where the same Sixth Amendment governs all federal defendants throughout the country. This Court should not condone conflicts among neighboring Courts of Appeals on an issue as important as judicial review of the deprivation of a constitutional right.

The continuing rivalry that exists in the Circuits over the effective assistance of counsel is intolerable. In the United States, the right to challenge the constitutionality of a conviction, based upon a Sixth Amendment violation, must be the same for all. Otherwise that right is rendered conditional. And, a conditional right, heavily encumbered by unrealistic preservation requirements, is no right at all.

[31] *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (Supreme Court granted certiorari to resolve a conflict among the Circuits on the question of whether District Court orders denying counsel's disqualification motions are immediately appealable); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (certiorari granted to resolve conflict as to whether an appellate court may direct the entry of judgment as a matter of law).

The parochial procedural preferences of the Second and Seventh Circuits must yield to the superior force of a national rule that embraces the prevailing view that *all* ineffective assistance of counsel claims can be brought in a collateral proceeding, even though that issue was not raised on direct appeal. Such a uniform policy will bring badly needed stability and certainty to an area of expanding constitutional litigation.

V. Petitioner's Ineffectiveness Claim Was Not Based Solely on the Record Developed at Trial and the Facts of This Case Lead to the Inevitable Conclusion That Judicial Review is Required of This Claim

Finally, even if this Court sustains the Second Circuit's extreme approach, Petitioner should not be barred from obtaining judicial review of the merits of his Sixth Amendment claim that was *not* based solely on the record developed at trial.

While some of counsel's failings were apparent in the trial record, the panel overlooked the crucial *prejudice* component under *Strickland*. For example, on Joseph Massaro's direct appeal, counsel had no basis to assert prejudice from the trial lawyer's failure to obtain an adjournment because, based on the record, the bullet appeared to be linked to the murder. It was only after the appeal that a proper investigation uncovered the *prejudice* resulting from counsel's refusal of the court's repeated offers of a continuance to investigate the bizarre circumstances surrounding the belated discovery of the bullet.

Moreover, new appellate counsel, who was bound by the trial record, had no duty to conduct an independent investigation of the bullet's origin outside the confines

of the record in the trial court. Only after a subsequent examination uncovered the fallacies in the Government's analysis of the bullet (J.A. 164-75) did the prejudice of counsel's failings become manifest.

Furthermore, even if the ineffectiveness claim could have been raised on direct appeal, Joseph Massaro's complaint is certainly significant enough to meet the Second Circuit's "cause and actual prejudice" test. The Government's withholding of the bullet constituted cause for not bringing the ineffective assistance claim on direct appeal.[32] The failure to disclose such a vital piece of evidence placed counsel in an untenable position and one from which he admittedly should have acted more competently to extricate the Defendant. One cannot deny, however, the Government's contribution to this dilemma and the prejudice to Joseph Massaro.[33]

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[32] The Government infringes on effective assistance of counsel when it interferes with counsel's right to make important decisions concerning the defense of the accused. *Geders v. United States*, 425 U.S. 80, 91 (1986).

[33] At the very least, there should have been an investigation of this constitutional issue through a hearing. *See, e.g., Bloomer v. United States*, 162 F.3d 187, 195 (2d Cir. 1998) (district court order denying petitioner's application for relief under 28 U.S.C. § 2255 was vacated and remanded so that trial counsel could be called and then the court could make a finding as to the ineffective assistance claim).

The unusual facts of this case also lead to the inevitable conclusion that Petitioner should not be deprived of a proper avenue for judicial review of his constitutional claim. To briefly summarize, we urge that review is just and warranted where the undisputed facts establish:

(1) Only after he was able to buy and broker a deal with the Government did Patrick Esposito implicate Joseph Massaro in the murder;

(2) initially there was absolutely no physical evidence to link Massaro to the homicide;

(3) a bullet surfaces *three years* after the murder — even though the car in which it was allegedly found had been thoroughly searched by the police and was out of the control and custody of the State for a considerable period of time;

(4) the prosecutor learned about the bullet *before* defense counsel made his opening statement and held onto it, rather than divulge this important evidence to the defense;

(5) well into the trial the prosecutor eventually notified counsel of the bullet and his test results;

(6) defense counsel failed to take adequate steps to investigate issues relating to the belatedly revealed bullet;

(7) after a considerable amount of time, defense counsel "reluctantly" moved for a mistrial and indicated that a new trial would "virtually bankrupt" him;[34]

(8) the trial court denied the motion for a mistrial but repeatedly offered defense counsel continuances to investigate the scientific evidence — all of which were rejected by counsel;

(9) no hearing was ever conducted on whether trial counsel was ineffective in failing to accept a continuance;

(10) subsequent investigations revealed the full effect of defense counsel's failure to test the bullet and conduct further investigation; and

(11) the Second Circuit's strict imposition of a procedural bar deviates from virtually all other authority throughout the nation as well as the position traditionally advocated by the Solicitor General.

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[34] Here, trial counsel's judgment may have been influenced by concerns for his own financial welfare, creating a "conflict" that would render his representation "presumptively" ineffective. Counsel's complaint that he could not "afford" a mistrial because it would "bankrupt" him is troubling — even though he moved for one (J.A. 19, 25). These personal concerns may have been responsible for his refusal to seek a continuance which would have prolonged the trial and placed an additional drain on counsel's resources. Considering the high mortality rate of mistrial motions, it is fair to assume that counsel anticipated its denial. On the other hand, he knew that the continuance would be granted because of the court's clear offer. A conflict, based on personal financial concerns, places in a different light counsel's other trial defaults.

The indispensable safeguards that our civilization has evolved for the ascertainment of guilt were denied to Joseph Massaro because of counsel's ineffectiveness taken in combination with the prosecutor's action in withholding the bullet until after the trial commenced.

The true injustice in this case — and in those that are bound to emerge in its wake — is that the District Court and Second Circuit never addressed the merits of Joseph Massaro's ineffectiveness claim and instead relied on the precarious claim of "procedural forfeiture" to deny judicial review. Under *Billy-Eko*, defendants like Joseph Massaro will be deprived of *any* safeguards where certain ineffectiveness claims are presented on collateral attack, rather than direct appeal.

CONCLUSION

All that Joseph Massaro has ever asked for is his day in court[35] — a chance to have the merits of his ineffective assistance of counsel claim addressed. The judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court for a hearing on whether Joseph Massaro was deprived of the effective assistance of counsel.

The Court should overrule the doctrine established in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), as applied in this case, and adopt a uniform policy that permits a federal criminal defendant to raise a Sixth Amendment ineffectiveness challenge in a collateral proceeding even though that issue was not raised on direct appeal.

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[35] *Cf. Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (criminal defendant was entitled to have his day in court on his allegations of the systemic exclusion of African American jurors in his case even though he first raised the issue in a motion for a new trial).

November 14, 2002

Respectfully submitted,

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